83-809

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HOWARD E. HINKIE, SR., ET AL,
Plaintiff-Petitioners

v.

UNITED STATES OF AMERICA, ET AL,
Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Does the *Feres* doctrine bar all claims against the United States for genetic deficiencies causing birth defects of one and death of another of children and miscarriages and mental suffering of the wife of a serviceman caused by his exposure to radiation while on active duty in the United States Army?

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PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Third Circuit whose judgment is sought to be reviewed are as follows: Howard E. Hinkie, Sr. and Irene Hinkie as parents and natural guradians of Paul Hinkie, Irene Hinkie individually, Howard E. Hinkie, Sr., Administrator of the Estate of Timothy Hinkie, Deceased, Appellees; United States of America, Appellant. The defendant, Reynolds Electrical and Engineering Company, is not involved in the Government's original Motion to Dismiss under Rule 12(b)(1) nor in the appeal to the Third Circuit Court of Appeals. All original defendants except the United States and Reynolds Electrical and Engineering Company have been dropped from this suit by Amended Complaint filed December 11, 1980. Howard E. Hinkie, Sr. is a party to the proceeding in a representative capacity, only.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HOWARD E. HINKIE, SR., ET AL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit reported at 715 F.2d 96 appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Pennsylvania which was reversed on appeal, is reported at 524 F. Supp. 277.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 18, 1983. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Tort Claims Act
28 U.S.C. §1346(b)

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

Irene Hinkie, her son, Paul, and the Estate of her deceased son, Timothy, brought separate independent causes of action against the United States and Reynolds Electrical and Engineering Company for injury and birth defects caused by the exposure of Howard E. Hinkie, Sr. to radiation during his service with the United States Army. In the Amended Complaint Irene's claim is for miscarriages and emotional suffering, Paul's for birth defects and Timothy's for birth defects and resulting death.

The plaintiffs brought suit against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C., §1346 (b), (hereinafter designated as FTCA). The United States moved to dismiss this action pursuant to Rule 12(b) (1), Federal Rules of Civil Procedure, and urged upon the District Court the argument that the plaintiffs are not entitled to a remedy on the grounds that the Court lacked subject matter jurisdiction and that the Amended Complaint failed to state a claim upon which relief can be granted. The Government based its argument on the premise that the plaintiffs' claims are barred by *Feres v. United States*, 340 U.S. 135 (1950) wherein the Supreme Court created an exception to the general waiver of immunity under the FTCA.

The District Court denied the Government's Motion and the United States moved for reconsideration or, in the alternative, certification of the issue for interlocutory appeal. The District Court, on August 5, 1982, certified the matter for interlocutory appeal which was granted by the Third Circuit Court of Appeals on August 3, 1982.

The Circuit Court reversed the order of the district Court concluding that these claims are barred under the *Feres* doctrine and that Court's decision in *Mondelli v. United States* (filed July 15, 1983), 711 F.2d 567.

REASONS FOR GRANTING THE WRIT

POINT I

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH AN EARLIER DECISION OF THIS COURT

POINT II

THE HOLDING OF THE CIRCUIT COURT IS AN UNNECESSARY AND UNWARRANTED EXTENSION OF THE POLICY CONCERNS ANNOUNCED BY THIS COURT IN *FERES*, AND THUS PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED AND SETTLED BY THIS COURT

POINT III

THE CIRCUIT COURT'S INTERPRETATION OF THE FTCA, WHICH TREATS ROSEMARIE MONDELLI DIFFERENTLY FROM SIMILARLY SITUATED CIVILIAN INFANTS, PURELY ON THE BASIS OF HER STATUS AS THE CHILD OF A FORMER SERVICEMAN, PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW, WHICH SHOULD BE REVIEWED AND SETTLED BY THIS COURT

This Court has pending before it a Petition for a Writ of Certiorari filed in *Mondelli v. United States*, (3rd Cir. No. 82-5545) which has set forth the above Points in support of the granting of a Writ. The underlying issues in that Petition are identical with those present here. Counsel in *Mondelli* has set forth clear and concise reasons in their Petition and cogent arguments in support of those reasons. Petitioner here incorporates the reasons, arguments and legal authorities set forth in *Mondelli* and urges upon this Court that there is a clear necessity for a current analysis of the *Feres* doctrine and

its application to a class of plaintiffs represented by the Hinkie family; Rosemarie Mondelli; Denise Monaco, *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989, 1982; the Lombard family, *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1983), *cert. denied*, ____ U.S. ____, 103 S. Ct. 3086 (1983); the Laswell children, *Laswell v. Brown*, 683 F.2d 261 (8th Cir. 1982), *cert. denied, Laswell v. Weinberger*, ____ U.S. ____, 103 S. Ct. 1205 (1983); Charles Scales, *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, ____ U.S. ____ 103, S. Ct. 1772 (1983).

POINT IV

THE CIRCUIT COURT'S RELIANCE UPON *CHAPPELL* IS NOT WARRANTED AND EXTENDS A RULE APPLICABLE TO MILITARY DISCIPLINE TO PLAINTIFFS WHO ARE IN A CIVILIAN STATUS

The decision of this Court in *Chappell v. Wallace*, ____ U.S. ____ 76 L. Ed 2d 586 (1983) and its application of the military discipline factor in *Feres* does not present a controlling rule affecting the civilian status of the Hinkie family.

Chappell deals directly with the relationship of the servicemen and their superior officers in a *Bivens* type of lawsuit for constitutional torts directly against government employees in their individual capacities. *Chappell's* reliance on the *Feres* doctrine considers only one factor, that is: the "peculiar and special relatonship of the soldier to his superiors, and the effect on the maintenance of such suits on dicipline". Neither *Chappell* nor the cases considered in the Opinion deal with civilian claims against the government or employees in their individual capacities. On the basis of the difference and distinguishable facts in *Hinkie*, the *Chappell* decision is not controlling.

What is most significant is the recognition by this Court of the distinction between civilian and military claims where in *Chappell* it is pointed out:

> The special status that the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. *Burns v. Wilson*, supra., 346 U.S. at 140. The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by judicially created remedies exposing officers to personal liability at the hands of those they are charged to command. 76 L.Ed 2d at 593.

And, a further significant point in *Chappell* that limits its application is the further holding that:

> This Court has never held, nor do we now hold, that military personnel are barred from alm redress in civilian courts for constitutional wrongs suffered in the course of military service. 76 L.Ed 2d at 593.

The Court here fully recognizes that our court system is still an open forum for military personnel under certain situations (not enumerated in *Chappell*); it is difficult to conclude, therefore, that this Court would foreclose a lawsuit by civilians under the facts in this case.

CONCLUSION

It has been clearly demonstrated that this Court in *United States v. Brown*, 348 U.S. 110 (1954) strongly rejected the "but for" rule on which the government and the Circuit Court relied. The Circuit Courts in *Scales*, *Lombard* and *Monaco* offered various apologies to the claimants for being bound by what they considered to be a proper application of the rationale dictated by *Feres* and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). It is only necessary to look at the language of the Fifth Circuit in *Scales v. United States*:

> For the foregoing reasons, we are compelled, however reluctantly, to reverse the judgment of the District Court and dismiss the claim as barred by *Feres*. We are not blind to the tragedy of Charles' condition, and we regret the effects of our conclusion. Nevertheless, we are not writing on a clean slate. 685 F.2d at 974.

And in *Lombard v. United States*, the Circuit Court of Appeals for the District of Columbia concluded:

> In rendering this decision, we are not without very considerable sympathy for Theodore Lombard and his family. This is particularly true for the Lombard children for whom there is at present no viable means of redress for the injuries they may have suffered. Because we must adhere to *Feres* and other controlling decisions, however, we must find that the claims of the members of the Lombard family were properly dismissed for lack of subject matter jurisdiction. 690 F.2d at 227.

And, the Ninth circuit in *Monaco v. United States*, in its conclusion holds:

> The *Feres* doctrine today stands on shaky ground with its precise justifications somewhat confused . . . The result in this case disturbs us, particularly

> with respect to Denise. In her case, the price of avoiding examination of events long past, and involving her behavior in no respect, appears to be complete denial of recovery. If developed doctrine did not bind us, we might be inclined to make an exception in cases such as this. 661 F.2d at 134.

In the proper application of a rule of law the Courts should not be required to offer such apologies. For this and the other reasons, it is urged upon this Court that a Writ of Certiorari should issue to review the opinion of the Circuit Court.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1554

HINKIE, Howard E. Sr.; HINKIE, Irene; HINKIE, Paul a minor by his parents and natural guardians Howard E. and Irene Hinkie; HINKIE, Howard E. Sr., Administrator of the Estate of Timothy Hinkie, deceased, on behalf of all others similarly situated.

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY, VETERANS ADMINISTRATION, JIMMY CARTER, President, JAMES R. SCHLESINGER, Secretary of Energy, MAX CLELAND, Administrator of the Veterans Administration, DR. JAMES LIVERMORE, Deputy Assistant Secretary of Energy, DR. CLARENCE LUSHBAUGH, Administrator, Medical Division, Oak Ridge Associated Universities, GLENN T. SEABORG, former Head, Atomic Energy Commission, ROBERT A. LOVETT, former Secretary of Defense, BRIGADIER GENERAL WILLIAM C. BULLOCK, U.S. Army, Commander of Camp Desert Rock, and certain other past and present officers of the U.S. Department of Energy, U.S. Department of Defense, Department of the Army, the former Atomic Energy Commission, and the Veterans Administration who will be named as defendants when ascertained, individually and in their official capacities.

REYNOLDS ELECTRICAL AND ENGINEERING CO., INC., 2501 Wyandotte Street, Las Vegas, Nevada 89114; E G & G INC., 45 William Street,

Wellesley, Massachusetts 02181; HOLMES & NARVER INC., 400 E. Orangethorpe Avenue, Anaheim, California 92801; UNITED STATES FILTER CORP., 522 Fifth Avenue, New York, New York 10036; ROCKWELL INTERNATIONAL CORP., 600 Grant Street, Pittsburgh, Pennsylvania 15219; VICTOREEN INSTRUMENT CO., INC., 10101 Woodland Avenue, Cleveland, Ohio 44104; SHELLER-GLOBE CORP., 1505 Jefferson Avenue, Toledo, Ohio 43624; BECKMAN INSTRUMENTS INC., 2500 Harbor Boulevard, Fullerton, California 92632

United States of America, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 79-2340)

Argued: June 14, 1983

Before: HUNTER and HIGGINBOTHAM, *Circuit Judges* and ZEIGLER, *District Judge**

(Filed August 18, 1983)

J. PAUL McGRATH
Assistant Attorney General

PETER F. VAIRA, JR.
United States Attorney

---

* Honorable Donald E. Zeigler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

SUSAN P. ENGELMAN (Argued)
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Civil Division
Department of Justice
Washington, DC 20530
Attorneys for Appellant

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

We are forced once again to decide a case where "we sense the injustice . . . of [the] result"[1] but where nevertheless we have no legal authority, as an intermediate appellate court, to decide the case differently.

Plaintiffs-appellees, Irene Hinkie, wife of Howard Hinkie, her son Paul, and the estate of her deceased son Timothy, brought this action against the United States and Reynolds Electrical and Engineering Company. The gravamen of plaintiffs-appellees' complaint is that Irene's miscarriages, Paul's birth defects, and Timothy's birth defects and death were caused by the exposure of Howard Hinkie to radiation during active duty in the United States Army almost thirty years ago. The complaint avers that any injuries suffered by plaintiffs were incident to Howard Hinkie's military service, and that his alleged exposure to radioactive materials occurred while he was on active duty in the Army. Plaintiffs-

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1. *Mondelli v. United States*, No. 82-5545 (filed July 15, 1983), Typescript Opinion at 8.

appellees have alleged that the Federal Tort Claims Act, 28 U.S.C. §2671-80, *et seq.*, and 28 U.S.C. §1346(b) and 28 U.S.C. §1331(a) provide the jurisdictional basis for their claims against the defendant-appellant United States of America.

Before the district court, the defendant-appellant United States moved for the dismissal of the action on the grounds that the court lacked jurisdiction over the subject matter of the action and that pursuant to the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950), the complaint fails to state a claim upon which relief can be granted.

In a most thoughtful opinion, Judge Norma L. Shapiro, denied the government's motion to dismiss. *Hinkie v. United States*, 524 F.Supp. 277 (E.D. Pa. 1981). The United States moved for reconsideration and vacation of that denial, or, alternatively, for certification of the issue for interlocutory appeal. Thereafter, the District Court, certified its order of denial for interlocutory appeal under 28 U.S.C. §1292(b).[2] Defendant-Appellant petitioned this Court for permission to take an interlocutory appeal and by Order dated August 31, 1982, that petition was granted.

I.

It is undisputed that Howard Hinkie's recovery, for injuries due to exposure to radioactive material while he was on active duty in the United States Army some thirty years ago, is barred under *Feres v. United States*. *See Jaffee v. United States*, 663 F.2d 1226, 1232 (3d Cir.

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2. The question certified to this court for interlocutory appeal is:

> Does the *Feres* doctrine bar suit against the United States for a mother's miscarriages and birth defects and death of children if the injuries were caused by the Army's negligent exposure of their husband and father to harmful levels of radiation in the course of his former military service?
>
> Appendix, p. 84

1981) (en banc); *cert. denied*, 456 U.S. 972 (1982). Irene, Paul and the estate of Timothy sue for injuries incident to chromosonal damage suffered by Howard Hinkie while he was in military service. Irene alleges injuries in the form of miscarriages, Paul in the form of birth defects and the estate of Timothy in the form of birth defects that led to his death. We find that these claims are also barred under the *Feres* doctrine and our most recent decision in *Mondelli v. United States*, No. 82-5545 (filed July 15, 1983).

The *Feres* doctrine, in addition to barring injuries suffered by military personnel incident to active duty military service, extends to service-related suits when the injury to a civilian has its genesis in the actionable injury suffered by the military personnel incident to military service. *Mondelli* barred recovery under the FTCA to a daughter who suffered genetic injuries due to her father's participation in the test of a nuclear device while on active military duty.

Although the result is admittedly harsh,[3] we conclude that the facts of *Hinkie* are not legally distinguish-

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3. Almost two years ago we held that a serviceman, Stanley Jaffee, and his wife had no cause of action under the Federal Torts Claims Act despite the fact that in 1953.

> he and other active soldiers at Camp Desert Rock in the State of Nevada were ordered by their commanding officers to stand in a field without benefit of any protection against radiation while a nuclear device was exploded a short distance away. Even though the defendants allegedly knew they were exposing Jaffee and the other soldiers to grave risk of injury and death, they 'knowingly, deliberately and recklessly disregarded this knowledge by compelling Jaffee and the other soldiers to participate in the test.' [citation omitted] As a result of this exposure to radiation, Jaffee developed inoperable cancer in November of 1977.

Jaffee v. United States, 663 F.2d at 1229.

Judge Gibbons wrote an eloquent and forceful dissent in which he stated:

able from *Mondelli*, and we therefore must reverse the decision of the district court.

As was noted in *Mondelli*:

> Rarely does the law visit upon a child the consequences of actions attributed to the parents. *Cf. Trimble v. Gordon*, 430 U.S. 762, 769 (1977);

NOTE — *(Continued)*

> These allegations charge a violation of human rights on a massive scale. The plaintiffs seek to prove, and we must at this stage assume that they can, that civilian and military officials of the government, acting without legal authority and with no sufficient legitimate military or other purpose, conducted a human experiment upon soldiers subject to their control, without their knowledge, permission or consent, by exposing them to radiation which those officials knew to be dangerous
>
> . . .
>
> Indeed the complaint alleges conduct which would violate the Universal Declaration of Human Rights, the International Govenant on Civil and Political Rights, the Geneva Convention, the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Nuremberg Code. The international consensus against involuntary human experimentation is clear. *A fortiori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt.

Jaffee, 663 F.2d at 1248-50; (footnotes omitted).

Partially in response to the dissent, the majority stated:

> We are also aware of what some might call a harsh result in our holding. We are not suggesting that individuals in plaintiffs' position should never receive any additional compensation from either the federal government or from private defendants which would supplement their present rights under the Veterans' Benefits Act. Any decision on whether claims of the plaintiffs should be converted to a cause of action, however, should be reserved for Congress to make in these special circumstances. It is that body which must weigh the competing priorities and policy judgments to determine whether a cause of action should be created.

Jaffee, 633 F.2d at 1228.

In the two year interim after the opinion in *Jaffee*, there has still been no Congressional resolution of this vexing problem.

> *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). Nevertheless, the Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline. Although these are delicate policy judgments, they are in the final analysis committed to Congress. Consequently, we conclude, with reluctance, that the claims of [the child] are barred.

Typescript Opinion at 8.

Just as it seemed unfair in *Mondelli* to deny the child the right to recover, it seems equally unfair to "visit upon" the spouse without recompense for the incidental consequences of actions attributable to her husband's military service.

Because the controlling precedent forecloses any other option, the order of the district ccurt will be reversed and the case remanded for proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 79-2340)

Present: HUNTER and HIGGINBOTHAM, *Circuit Judges*, and ZEIGLER, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 14, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered August 6, 1982, be, and the same is hereby reversed and the cause remanded for proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Clerk

August 18, 1983

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* Honorable Donald E. Zeigler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on September 9, 1983.
Test:

Chief Deputy Clerk,
U.S. Court of Appeals
for the Third Circuit

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CLERK

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October Term, 1983
No. 83-809

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Plaintiff-Petitioners

v.

UNITED STATES OF AMERICA, ET AL,
Defendant-Respondent

SUPPLEMENTAL APPENDIX

(PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT)

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524 F. Supp. 277

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD E. HINKIE, SR., et al.	:	Civil Action
	:	
v.	:	
	:	
UNITED STATES OF AMERICA, et al.	:	No. 79-2340

MEMORANDUM and ORDER

Norma L. Shapiro, J. October 14th, 1981

INTRODUCTION

Irene Hinkie is the wife of Howard E. Hinkie, Sr. ("Hinkie, Sr."), a former serviceman allegedly exposed to harmful doses of radiation during the 1955 Army nuclear testing in Nevada. She, Paul Hinkie (her son), and the estate of Timothy Hinkie (her deceased son), bring this action against the United States and against Reynolds Electric and Engineering Company ("REECO"). They charge that various injuries sustained by them were caused by defendants' negligence in the conduct of the "Teapot Dome" series of nuclear tests that took place in the Nevada desert in the 1950's. Hinkie, Sr. has stated a claim against REECO but not against the United States. Before us is the United States' motion to dismiss the claims of Irene, Paul and Timothy Hinkie on the ground that under *Feres v. United States*, 340 U.S. 135 (1950), the general waiver of sovereign immunity enacted in the Federal Torts Claims Act, 28 U.S.C. §2671 *et seq.* ("FTCA"), does not apply to claims asserting injuries to a servicemen incident to military service. For the reasons which follow, defendant's motion will be denied.

I. FACTS

In ruling on the motion to dismiss, we must accept plaintiffs' allegations of fact. Plaintiffs allege that Hinkie, Sr. enlisted in the United States Army in 1953 and was trained as a pole lineman. (Amended Complaint, ¶8). In February 1955, Hinkie, Sr. was ordered to Camp Desert Rock, Nevada to participate in nuclear testing programs. (Amended Complaint, ¶9). Hinkie, Sr. neither requested nor volunteered to participate in the Desert Rock nuclear testing program. Between February and June of 1955, he participated in 17 or 18 nuclear tests; he was exposed to nuclear radiation from these tests and other sources of radiation at the Nevada test site. (Amended Complaint, ¶¶9, 10). Hinkie, Sr.'s duties in the field included laying and retrieving communication wires, operating a switchboard immediately prior to detonations, observing the nuclear explosion, and walking to "Ground 0." He was exposed to ionizing radiation and inhaled radioactive dust. (Amended Complaint, ¶15).

Hinkie, Sr. was not informed of the hazards of exposure to ionizing radiation known to the United States. Hinkie, Sr. was given assurances by the United States, acting through military personnel, that his cumulative exposure was carefully monitored by film badges, which were represented as a reliable means of measuring radiation exposure. (Amended Complaint, ¶11). Hinkie, Sr. was never given protective clothing to wear in the field. (Amended Complaint, ¶12). The United States omitted to read and/or preserve the records from a large number of the film badges worn by Hinkie, Sr. The United States assured the safety of Hinkie, Sr. with a film badge program that it knew or had reason to know was inadequate. (Amended Complaint, ¶18).

Prior to November 1978, the United States never gave Hinkie, Sr. any information on his cumulative radiation exposure from the nuclear tests nor has the United States ever informed Hinkie, Sr. of the adverse health effects which were known by the government to be asso-

ciated with ionizing radiation. (Amended Complaint, ¶13). At the time of the nuclear tests in which Hinkie, Sr. participated, the United States knew, or should have known, that exposure to ionizing radiation would have adverse effects on the health of human beings so exposed. One such adverse effect is the production of genetic defects in offspring conceived after such exposure. (Amended Complaint, ¶¶16, 17).

Plaintiffs allege these negligent acts caused perturbations in the molecular substance of Hinkie, Sr., that is, breakages in the chromosomes as well as other forms of chromosomal alteration such as inversions, partial displacements, and deletions not amounting to a total breakage of the chromosomes. (Amended Complaint, ¶21, ¶33(a)). These perturbations in molecular substance of Hinkie, Sr. eventually formed parts of the bodies of Hinkie's deceased son (Timothy) and his son (Paul) that manifested themselves as defects at the time of their births. (Amended Complaint, ¶21).

Plaintiffs further allege that by the above-mentioned acts and omissions, the United States negligently caused the minor plaintiff (Paul Hinkie) to suffer from birth defects including Rubenstein-Taybies syndrome, lack of joints in his thumbs, constant uncontrollable twiching of his eyes, severe mental retardation and photophobia. (Amended Complaint, ¶45). It is also alleged that as a proximate result of these acts and omissions on the part of the defendant United States, plaintiffs' decedent (Timothy Hinkie), was born on March 29, 1964 with severe and disabling birth defects, including but not limited to the lack of an esophagus and esophageal fistula, which caused him pain, mental anguish and his death on January 7, 1966. (Amended Complaint, ¶39). Finally, it is alleged that as a result of the negligent acts and omissions of defendant United States, plaintiff Irene Hinkie suffered three miscarriages and mental anguish because of the congenital defects of her son Paul and death of her son Timothy.

II. DISCUSSION

The facts alleged by plaintiffs Irene, Paul and the estate of Timothy Hinkie, with all inferences taken most favorably to them for purposes of defendant United States' motion to dismiss, state causes of action which are not barred by the FTCA on the ground that their injuries are service related.

At common law the United States was immune from civil tort actions for damages. The FTCA, enacted by Congress in 1946, grants federal district courts exclusive jurisdiction of tort actions commenced against the United States. 28 U.S.C. §1346.[1] The government's consent to such liability is limited by certain explicit statutory exceptions. 28 U.S.C. §2680.[2] In addition, the Supreme Court has held that it is implicit that the FTCA does not permit government liability for injuries arising out of or in the course of activity incident to service;

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1. 28 U.S.C. §1346(b) provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Congress explicitly expected certain actions related to the United States military in 28 U.S.C. §2680 (j); "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to —

> [j] Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

This statutory exception is inapplicable here because it is conceded that the incidents complained of were not "combatant activities . . . during time of war."

Feres v. United States, 340 U.S. 135, 146 (1950) (no recovery under the FTCA for the death of an Army officer caused by fire in the barracks where he was quartered or for death or injury of members of the armed forces from Army medical malpractice). In *Feres*, the determining factor was the status of the injured party as a member of the armed forces on active duty at the time the cause of action arose.

In *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669 (1977), after a National Guardsman was awarded a government pension for injuries received in flight training, he brought an action against the United States and the contractor that manufactured the equipment causing his injuries. The contractor cross-claimed for indemnity from the United States. Summary judgment for the United States was affirmed because the serviceman's claim was barred as incident to military service; therefore, there could be no indemnity with regard to that claim. The Court, reaffirming the *Feres* doctrine stated, "[i]n *Feres v. United States, supra*, the court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act."

The claim barred in *Stencel* was also for injury to an on-duty serviceman. However, the issue before us is the extent to which the *Feres* doctrine bars claims not of the serviceman himself but of the civilian members of his family.

There have been two lines of cases regarding recovery by members of a serviceman's family since *Feres*. Members of a serviceman's family have recovered against the United States for injuries caused directly to them, independent of any injury to the serviceman, if they arise from non-combatant activities. Even the serviceman himself may recover consequential damages for such injuries. *See, Costley v. United States*, 181 F.2d 723 (5th Cir. 1950) (sergeant can maintain FTCA action

for injuries to wife resulting from negligence incident to delivery of child in an Army hospital); *Grigalauskas v. United States*, 103 F. Supp. 543 (D. Mass. 1951), *aff'd*, 195 F.2d 494 (1st Cir. 1952) (sergeant may recover consequential damages for injuries sustained by infant daughter at Army hospital); *Fournier v. United States*, 220 F. Supp. 752 (D. Miss. 1963) (serviceman and daughter recovered for wife's death caused by negligence of government employees at an officer's club); *Herring v. United States*, 98 F. Supp. 69 (D. Col. 1951) (serviceman's wife may recover for injury as a patient in Army hospital; the status of injured party is determinative); *Messer v. United States*, 95 F. Supp. 512 (D. Fla. 1951) (sergeant on active duty may recover for injury to wife caused by negligence of Army hospital employees); *Wilscam v. United States*, 76 F. Supp. 581 (D. Hawaii 1948) (Naval officer recovered for death of his minor child caused by negligence of Naval medical corpsman); 31 A.L.R. Fed. 146, 193 (1977).

However, recovery by family members has been barred under the *Feres* doctrine where the cause of action is ancillary or derivative to the serviceman's action for his own injury. In *Feres*, two of the three claims barred were wrongful death actions brought by widows of servicemen who died incident to their service.[3] Similarly, actions by family members for alleged injuries suffered themselves by reason of a serviceman's injury, that is, derivative injuries, have been held barred by the *Feres* doctrine. *De Font v. United States*, 453 F.2d 1239 (1st Cir. 1972), *cert. denied*, 407 U.S. 910 (1972) (serv-

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3. Some courts have dismissed a survivor's wrongful death action in reliance on *Feres* without discussing whether the action was ancillary or independent in character. *See, e.g.*, Watkins v. United States, 462 F. Supp. 980 (S.D.Ga. 1977), *aff'd*, 587 F.2d 279 (5th Cir. 1979) (per curiam); Knight v. United States, 361 F. Supp. 708 (W.D.Tenn. 1972), *aff'd without opinion*, 480 F.2d 927 (6th Cir. 1973); Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal. 1971), *aff'd*, 455 F.2d 1380 (9th Cir. 1972) (per curiam).

iceman's wife's action for mental anguish; child for loss of companionship); *Harrison v. United States*, 479 F. Supp. 529 (D. Conn. 1979), *aff'd without opinion*, 622 F.2d 573 (2d Cir. 1980), *cert. denied*, 449 U.S. 828 (1980) (serviceman's wife for loss of consortium); *Wisniewski v. United States*, 416 F. Supp. 599 (E.D.Wis. 1976) (marital disharmony). *See, In re Agent Orange*, 506 F. Supp. 762, 780 (E.D.N.Y. 1980).

This case does not fall neatly into either line of cases. It resembles the first line of cases allowing recovery for direct injuries to members of the serviceman's family rather than to the serviceman. Hinkie, Sr. brings no claim against the United States on his own behalf; Hinkie, Sr.'s representative action is a claim for Timothy's death. Paul and Irene claim damages for their own physical injuries. The Hinkies do not claim loss of the services or companionship of Hinkie, Sr. because of an injury to him, nor do they claim a loss because of his injury or death. But in those cases permitting recovery, the serviceman himself had not been directly injured. However, the Hinkies' claims occurred only because of the injury to Hinkie, Sr. The Hinkies' claim is that the chromosomal damage to Hinkie, Sr. caused the injuries to them just as the personal injury to or death of a serviceman gives rise to a cause of action for wrongful death or loss of companionship and consortium. In this respect, it resembles the second line of cases rejecting liability for derivative injuries.

In the following cases, like this case, a direct physical injury to a family member had allegedly been caused by some negligent action or omission of the United States with regard to the serviceman: *Harten v. Coons*, 502 F.2d 1363 (10th Cir. 1974), *cert. denied*, 420 U.S. 963 (1975) (wife's action for costs of pregnancy and child raising caused by negligent vasectomy on serviceman); *Monaco v. United States*, No. SC-79-0859 (N.D.Cal. 1979) *on appeal*, No. 79-4787 (9th Cir.) (child's action for congenital birth defects caused by

serviceman father's exposure to radiation); *Jessup v. United States*, No. 79-271-TUC-RMB (D. Az. 1980) (family's action for hepatitis contracted by negligent failure to diagnose serviceman's hepatitis); *In re Agent Orange*, 506 F. Supp. 762, 781 (E.D. N.Y. 1980) (children of veterans claim for genetic injury caused by parents' exposure to Agent Orange).

Recovery by family members was held to be barred by the *Feres* doctrine in *Harten*, *Monaco*, and *Agent Orange*, *supra*. The *Harten* court, applying the "incident to service test," held that the bar to the serviceman's recovery also barred the wife; the wife's claim was not considered independent of the serviceman's. In both *Monaco* and *Agent Orange* the courts considered the claim of the serviceman's children independent but held determinative "whether plaintiff's injuries have as their genesis injuries allegedly sustained incident to the performance of military service." *Monaco*, Slip Op. at 3; *Agent Orange*, 506 F. Supp. at 781.

The *Jessup* court reached a contrary result. Applying the criteria stated by the Supreme Court as the rationale for the *Feres* doctrine in *Stencel*, it determined that the reasons underlying the FTCA exception barring servicemen suits were inapplicable to actions by family members for their direct physical injuries.

Under the "genesis incident to service" test enunciated in *Monaco* and *Agent Orange*, the chromosome injuries to Hinkie, Sr. bar the family's claim because his injuries are alleged as the cause of their own. However, this oversimplification would avoid the necessary analysis of policies underlying the *Feres* doctrine which the Supreme Court requires in determining its application to novel cases. Therefore, we reject applying the *Feres* bar to every action somehow involving an injured serviceman. That result does not follow from the Supreme Court's analysis of *Feres* in *Stencel*.

In *Stencel*, the Court held that a government contractor could not seek indemnity from the United States

for damages to a member of the Armed Forces injured in the course of military service. The three factors justifying the *Feres* doctrine were:

> First, the relationship between the Government and members of its Armed Forces is 'distinctively federal in character,' . . . it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor was explicated in United States v. Brown, . . . namely '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . .' [citations omitted]. *Stencel,* at pp. 671-72.

After setting out these three factors the Supreme Court stated,

> We must therefore consider the impact of these factors where, as here, the suit against the Government is *not brought by the serviceman himself, but by a third party* seeking indemnification for any damages it may be required to pay the serviceman. *Stencel* at 672 (emphasis supplied).

Since the *Stencel* decision it is this analysis, not a bare "incident of service" test, which determines whether there is a cause of action by parties other than the serviceman himself. As acknowledged in *Harrison v. United States,* 479 F. Supp. 529, 534 (D.Conn. 1979),

aff'd without opinion, 622 F.2d 573 (2d Cir. 1980), *cert. denied*, 449 U.S. 828 (1980), holding a wife's claim for loss of consortium barred by *Feres*,

> . . . by focusing on these factors in *Stencel*, the Supreme Court provides a means of analysis to be employed in deciding whether a party other than a serviceman may recover against the Government for injuries to a serviceman.

See also, Daberkow v. United States, 581 F.2d 785, 787 (9th Cir. 1978) ("[i]n cases decided subsequent to *Feres*, both the Supreme Court and this Court have looked to factors underlying the *Feres* decision as the basis for determining, in fact situations not precisely identical with *Feres*, whether the *Feres* rule should apply;" suit by widow of serviceman killed while performing duties incident to military service barred); *Jessup v. United States*, *supra*.

The first *Stencel* factor results from the fact that state law determines liability under the FTCA. *See*, 28 U.S.C. §1346(b). As the relationship between the Government and its soldiers is "distinctively federal," it is undesirable that governmental liability should depend on the state where the soldier happens to be stationed at the time of the injury.

This factor carries little weight where the plaintiffs are related to the federal government only by the veteran status of the husband or father. At the time of Hinkie Sr.'s active military duty two of the plaintiffs had not been conceived. The government has no more distinctively federal relationship with Irene, Paul or Timothy Hinkie, than with any veteran's family. If the Hinkies were related to a civilian working for the government or for defendant REECO, they would not be barred as members of that civilian's family from stating a cause of action for injuries caused by chromosomal damage to the civilian against the United States under the FTCA. Similarly, if a nuclear testing accident caused personal

injuries to civilians, the civilians themselves would have a cause of action under the FTCA. In those cases liability would be determined by state tort law. *See, Jessup v. United States*, Slip Op. at 2 (local tort law applies to military dependents injured in military hospitals). We see no reason for a different result in this case.

It is not sufficient that these claims were created because of the alleged negligence of the United States towards an active serviceman. For example, if the negligence of an airplane pilot on active duty causes an airplane crash which causes property damages and personal injuries to civilians, an action lies against the United States under the FTCA. The fact that the civilians have claims for damages against the United States does not create a federal relationship as to them. The result should not differ if the independently injured civilians are members of the pilot's family, even if the pilot was a serviceman on active duty. That is the nature of the case presented to us. We decline to bar this claim by reason of a federal relationship where none exists between plaintiffs and the United States. The first *Feres* factor does not apply to the cause of action asserted by the Hinkies.

The second factor, the availability of the Veterans' Benefits Act which "provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government," *Stencel* at 671, as a substitute for tort liability, also carries little weight in the instant circumstances. The basic entitlement, 38 U.S.C. §331, "for disability resulting from personal injury suffered or disease contracted in line of duty," is payable to "any *veteran* thus disabled." (Emphasis supplied).

It is unclear whether Hinkie, Sr. could recover for disability on the facts alleged here, as the kind of chromosomal damage complained of may not fall within the basic entitlement of the Act. *See,* 38 U.S.C. §331. Additional compensation for dependents of veterans under 38 U.S.C. §335 would be available to the plaintiffs

herein only if Hinkie, Sr. himself could recover and had a disability rated at not less than 50 per centum. *See*, 38 U.S.C. §334. Even if these conditions were fulfilled, which appears unlikely, the individual plaintiffs would be receiving nothing for their own physical injuries or for Timothy's death. Rather, they would be recovering only dependents' benefits related to whatever disabling effects Hinkie, Sr. has suffered. Plaintiffs asserted at oral argument that they are not entitled to and have not received any benefits under the Veterans' Benefit Act.[4]

The government argues that in *Stencel*, the Stencel Aero Engineering Corporation, had no right to veterans' benefits. However, in that case the injured *serviceman* did receive substantial veterans' benefits as emphasized by the Court in *Stencel* at 668 and 672. In *Stencel*, the Act had provided adequately for the injured serviceman himself, and the Court deemed the Act to set an upper limit of government liability for service-connected injuries. Recovery against the government by the third-party tortfeasor was barred; *see*, *Stencel*, at 673. A similar result need not obtain in this case where no government liability under the Veterans' Benefits Act to the veteran or his family has been established of record.[5]

In *Stencel*, the Court also observed, at 674, that, "[s]ince the relationship between the United States and petitioner is based on a commercial contract, there is no basis for a claim of unfairness in this result." Stencel had "sufficient notice so as to take this risk into account in negotiating its contract for the emergency eject system at issue here." *Stencel* at 674, n.8. The plaintiffs here are

4. No claim by Hinkie, Sr. or receipt of veterans' benefits appears of record.

5. In one case applying the *Stencel* factors to bar liability, the court placed great emphasis on the substantial compensation received by plaintiffs. *See*, Daberkow v. United States, 581 F.2d 785 (9th Cir. 1978) (widow and child of foreign serviceman compensated under West German law for his death); *but see*, Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (acceptance of benefits by serviceman's family does not bar FTCA claim by family).

obviously not in a comparable position. In this context, the Veterans' Benefits Act provides an inadequate rationale for barring the cause of action here asserted.

The third factor considered in *Stencel*, the effect of the lawsuit upon military discipline, presents a more difficult issue.

> Turning to the third factor, it seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions. *Stencel*, 431 U.S. at 673.

In this case the trial would involve testimony of Armed Service members regarding each other's decisions and, perhaps, the "second-guessing" of military orders. However, we do not find that that fact, standing alone, warrants dismissal under *Feres* or *Stencel*, since it is difficult to see how this lawsuit would adversely effect military discipline. The injuries claimed were not apparent at the time the military orders were given nor soon thereafter. The plaintiffs' injuries, concededly derived from those to Hinkie, Sr. when in military service, manifested themselves decades after his discharge. The program of which the Teapot Dome tests were a part has long since ended. The undermining of discipline or refusal to follow orders present less of a problem because of the time lapse here involved.

Moreover, adverse effects on military discipline must not flow inevitably from the judicial scrutiny of a military order, for such scrutiny is no less involved in

other suits under the FTCA which Congress has not barred. An example would be an action by civilians injured by nuclear testing near their residences.

We are aware of the difficulties of proof facing the plaintiffs. *See Punnett v. Carter*, 621 F.2d 578 (3d Cir. 1980), where the Court affirmed a denial of a preliminary injunction "relating to the long range health effects from radiation exposure to all participants in the Nevada testing from 1951 to the present date." *Punnett, supra* at 580. The Court upheld the lower court's determination that these plaintiffs' probability of success on the merits in establishing causation of genetic defects by nuclear testing did not warrant injunctive relief. But after consideration of the three *Stencel* factors as they apply to this case, we have determined that the *Feres/Stencel* doctrine does not mandate dismissal of the plaintiffs' cause of action. We have not decided whether other exceptions to the FTCA, for example, the discretionary function exception,[6] are applicable to the plaintiffs' claims. We hold only that plaintiffs' claims against the United States are not barred by the *Feres* doctrine.

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6. The full language of the exception, 28 U.S.C. §2680(a) (1976), is as follows:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

For a discussion of the possible applicability of this exception to military claims under the FTCA see NOTE, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery? 77 Michigan Law Review 1099 (April 1979).

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD E. HINKIE, SR., et al.	:	Civil Action
	:	
v.	:	
	:	
UNITED STATES OF AMERICA, et al.	:	No. 79-2340

ORDER

AND NOW, this 14th day of October, 1981, it is ORDERED that defendant United States' motion to dismiss is DENIED.

BY THE COURT:

Norma L. Shapiro, J.

Office - Supreme Court, U.S.
FILED
DEC 13 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 83-632 and 83-809

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROSEMARIE MONDELLI, PETITIONER

v.

UNITED STATES OF AMERICA

HOWARD E. HINKIE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-632

ROSEMARIE MONDELLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-809

HOWARD E. HINKIE, SR., ET AL., PETITIONERS

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UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners are relatives of former servicemen who were allegedly exposed to radiation while on active duty in the 1950's. Petitioners seek to recover under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for injuries to them that were caused by the exposure of the servicemen to radiation.

1. a. Petitioner in No. 83-632, Rosemarie Mondelli, is the daughter of a serviceman who, while on active duty, was allegedly exposed to radiation from the explosion of a

nuclear device during a training exercise. Petitioner was born with a genetically transmitted cancer that, she alleges, was caused by her father's exposure to radiation. 83-632 Pet. App. 10. She sued under the FTCA in the United States District Court for the District of New Jersey. The government moved to dismiss her complaint, claiming that it was barred under the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that servicemen may not sue the government under the FTCA for alleged torts incident to military service. The district court denied the motion to dismiss, reasoning that petitioner "is not a serviceman or woman, [and] has never been under military orders" (83-632 Pet. App. 2).

The government took an interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals reversed (83-632 Pet. App. 8-14; 711 F.2d 567). The court noted that the principal basis of the *Feres* doctrine is the " 'peculiar and special relationship of the soldier to his superiors' in military service, *United States* v. *Brown*, 348 U.S. 110, 112 (1954)" (Pet. App. 11; footnote omitted) and that "[i]n many circumstances an action by a relative or dependent would raise the same issues, and require the same scrutiny of military decisions, as would an action by a soldier or sailor against the United States" (*id.* at 12). The court then ruled against petitioner for the following reasons (*id.* at 13; footnote omitted):

> An action for damages by [petitioner] would raise the same issues, and take the same form, as an action by her father * * *. The complaint avers that [petitioner's] injuries derive from her father's exposure to radiation. At trial, [petitioner] would be required to contest the prudence of exposing her father to radiation. This examination is foreclosed by *Feres*.

b. Petitioners in No. 83-809 are the wife and children of a serviceman who was also subjected to radiation as part of a training exercise while on active duty in 1955 (83-809 Pet. App. A3; 83-809 Pet. Supp. App. 2). They brought suit under the FTCA in the United States District Court for the Eastern District of Pennsylvania, and the district court denied the government's motion to dismiss the complaint (83-809 Pet. Supp. App. 1-15; 524 F. Supp. 277). The district court acknowledged that "[i]n this case the trial would involve testimony of Armed Service members regarding each other's decisions and, perhaps, the 'second-guessing' of military orders" (83-809 Pet. Supp. App. 13). But the court allowed the suit to proceed because the events at issue had occurred long before, reasoning that "[t]he undermining of discipline * * * present[s] less of a problem because of the time lapse here involved" (*ibid.*). The government appealed under 28 U.S.C. 1292(b), and the court of appeals reversed, relying on its decision in *Mondelli* (83-809 Pet. App. A1-A7; 715 F.2d 96).

2. As petitioners recognize (83-632 Pet. 24; see 83-809 Pet. 5, 7-8), the issue they raise has recently been considered by four other courts of appeals, and each has ruled in the same way as the court below. In each instance, this Court has declined review. *Monaco* v. *United States*, 661 F.2d 129, 133-134 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22, 1983); *Scales* v. *United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, No. 82-1203 (Apr. 18, 1983); *Lombard* v. *United States*, 690 F.2d 215, 223-226 (D.C. Cir 1982), cert. denied, No. 82-1443 (June 13, 1983). We discussed this issue in our Memoranda in Opposition in *Monaco* (No. 81-1658) and *Scales*.[1] For

[1]We have sent copies of these memoranda to counsel for petitioners.

the reasons stated in those memoranda this question continues not to warrant this Court's review.

Petitioners concede, as they must, that under *Feres* a serviceman may not sue the government for damages for injuries incident to military service (see 83-632 Pet. 4). Petitioners also do not directly ask the Court to reconsider *Feres*, which the Court unanimously reaffirmed only last Term. See *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 3-4. But a principal reason for the *Feres* doctrine is that the trial of a serviceman's claim for alleged torts committed incident to military service would "involve second-guessing military orders, and would * * * require members of the Armed Services to testify in court as to each other's decisions and actions" (*Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977)). As the court below explained, petitioners' suits for injuries resulting from the torts allegedly committed against the servicemen would necessarily involve the same kinds of inquiries.

Specifically, petitioners' suits would require courts to determine whether the military acted wrongfully in exposing the servicemen to radiation; "at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety" (*Stencel Aero*, 431 U.S. at 673). "[T]he effect of [such] action[s] upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Ibid.* As we explained in our Memorandum in Opposition in *Monaco*, the other reasons for the *Feres* doctrine — the exclusivity of the statutory veterans' benefits programs provided by Congress (see *Stencel Aero*, 431 U.S. at 672-673; *Feres*, 340 U.S. at 144; *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 (1980)), and the incongruity of allowing the situs of the government's alleged tort against the serviceman to determine the law governing his

claim, as it would if a suit were brought under the FTCA (see *Feres*, 340 U.S. at 143) — also apply with equal force to petitioners' suits (see *Stencel Aero*, 431 U.S. at 672-673).

Petitioners rely heavily (see, *e.g.*, 83-632 Pet. 6, 12-14, 17-19, 20; 83-809 Pet. 7) on *United States* v. *Brown*, 348 U.S. 110 (1954). But in *Brown* a former serviceman alleged that a government hospital afforded him negligent *post*-discharge treatment of a service-related injury. The Court in *Brown* explained that the basis of its ruling was that "the negligent act giving rise to the injury in the present case was not incident to the military service" (*id.* at 113). By contrast, the allegedly tortious acts giving rise to petitioners' injuries were, without question, incident to military service; the allegedly tortious acts were commands issued during military training exercises (see 83-632 Pet. 10-11).

Finally, petitioners contend that they are being denied a tort remedy "merely because of [their] status as the [children and relatives] of * * * former servicem[e]n" (83-632 Pet. 7). See, *e.g.*, *id.* at 29 (asserting that petitioner's claim was dismissed "for no reason other than her status as the daughter of a former serviceman"); *id.* at 31-32, 36. Indeed, petitioners claim that the denial of a tort remedy for this reason is unconstitutional (see *id.* at 29-35). But petitioners' suits are barred not because of petitioners' relationship to servicemen but because petitioners' claims will necessarily require the litigation of the same issues that the servicemen's claims would raise. If petitioners' claims did not require courts to make these inquiries — if, for example, petitioners were persons living near the site of a nuclear test who were injured by the test (see 83-632 Pet. 14-15, 21, 31) — *Feres* would not bar them from attempting to recover under the FTCA even if they happened to be the relatives of servicemen. By the same token, a suit may not be brought by *any* party whose claim would require a court to consider

whether the government committed a tort against a serviceman incident to service, even if that party was not a relative of a serviceman. *Stencel Aero, supra.*

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983

DOJ-1983-12